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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

MOTION OF L. M. CRAWFORD AND OF HIS ATTORNEY, THORNTON HARDIE, TO BE ALLOWED TO FILE ARGUMENT AND BRIEF IN THIS CAUSE.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 3, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

MOTION TO BE ALLOWED TO FILE ARGUMENT AND BRIEF IN THIS CAUSE.

To the Honorables the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now L. M. Crawford, of Wichita, in the State of Kansas, and respectfully moves the court to allow him, through his attorney, Thornton Hardie, of El Paso, in the State of Texas, to file a brief in this cause as *"amicus curiæ,"* and as grounds for this motion and reasons why it should be granted represents to this honorable court:

I.

This suit was brought as an original case in this court by the State of New Mexico against the State of Texas to [illegible] this honorable court fix and determine the boundary line between the State of Texas and the State of New Mexico between the parallel of 32 degrees of north latitude and the parallel of 31 degrees 47 minutes of north latitude. The State of Texas filed its answer and its cross-action, also asking that this court determine said boundary line.

In its petition the State of New Mexico alleged that the true boundary line between the two States within the limits in question was the middle of the channel of the Rio Grande as it existed in the year 1850, and as such channel was delineated upon the map designated "Exhibit C," attached to plaintiff's petition. In its answer and cross-act[illegible]n the State of Texas also alleged that the boundary was the middle of the channel of the Rio Grande as it existed in the year 1850 and filed a map which it claimed clearly showed the position occupied by the Rio Grande in 1850.

In the original pleadings, therefore, both sides alleged that the only real question at issue was the determination of the position occupied by the Rio Grande in 1850. However, the State of New Mexico in its prayer for relief prayed "That your orator may have such further or other relief as the nature of the case may require and to the court shall seem meet," and the State of Texas in its prayer prayed as follows: "And that this defendant have such other and further relief as may be found necessary in order correctly to establish and locate said boundary line between plaintiff and defendant at the point in question and as to the court shall

seem meet and proper." The petition of the State of New Mexico may be found on pages 2 to 5 of volume 1 of the transcript, and the answer and cross-bill of the State of Texas may be found on pages 15 to 20 of volume 1 of the transcript.

II.

Under the pleadings this court is called upon in this cause to establish the true boundary between the two States, and it is not bound by the allegations of either or both declaring that the true boundary is the position occupied by the river in 1850. As a matter of fact, there are no provisions in any of the treaties or conventions or acts fixing the boundary at this place which would take this case out of the general rule of law, which is to the effect that where a river such as the Rio Grande is the boundary between individuals or governments such river continues to be the boundary even though its position changes, provided such change occurs gradually, by erosion and accretion, and not by avulsion, and only where the change is shown to have been caused by avulsion does the river cease to be the boundary. However, the case was tried throughout and all evidence introduced upon the theory that the only material question was as to the location of the river in 1850. The brief of the State of New Mexico was devoted solely to the question of the location of the river in 1850. The changes in the position of the river were treated of only incidentally, as bearing upon the location of the river in 1850.

With the record in this situation L. M. Crawford caused an investigation of the record to be made by his attorneys and ascertained that at the portion of the boundary affecting his

land, if the river of 1850 occupied the position as claimed by Texas, then, nevertheless, it had changed its position by accretion so that in 1905 the river was in a position to the east of the position which it occupied in 1850, and it just happens that this land which had been added to New Mexico by accretion was the property of L. M. Crawford. However, the evidence in the record was not clear upon the situation involving this accretion, and therefore a new survey was made by R. J. Owen, one of the engineers for Texas in this suit, and an affidavit of such witness was secured which, in connection with the map prepared by R. J. Owen, shows the true facts concerning this portion of the boundary line as the position of such boundary line has been changed by accretion. When this information was called to the attention of the attorneys for the State of New Mexico, they filed a motion in this cause before this court to be allowed to prove the matters referred to in the map and in the affidavit of R. J. Owen above mentioned. After the affidavit of R. J. Owen had been secured, but before it was filed in this cause, the brief of the State of Texas was filed in this cause, and in this brief the State of Texas for the first time stated and recognized as applicable to this case the rule that the position of the boundary line would follow the changes in the river where such changes were made by erosion and accretion. (We refer to the next to the last paragraph on page 11 of part 1 of the brief of the State of Texas, and also to the last clause of the last paragraph on page 12 of part 1 of said brief. It will be noticed that on page 11, where the State of Texas purports to set forth the allegations of its answer and cross-bill, it has not accurately set out said allegations, in that, in the cross-bill and answer as it appears in the record it is al-

leged that the boundary lies along the middle of the channel of the Rio Grande as it existed in 1850, while in the brief there are added to such allegations the words which have been quoted above.)

Upon the trial of the case the State of Texas introduced in evidence "Defendant's Exhibit Number 65." An examination of this map will show what purports to be the position of the Rio Grande in 1905 from the 32d parallel south to the international boundary line. However, the testimony of R. J. Owen, as contained in the printed record and at the pages described in the affidavit of R. J. Owen, recently filed for the State of New Mexico, shows that the river in 1905 is not truly represented on "Defendant's Exhibit No. 65" from where the south line of the Canutillo Grant, extended west, would cross such river line down to Piedras Paradas, and in his affidavit R. J. Owen testifies that the map accompanying his affidavit does truly show the position of the river in 1905 in the territory in question. It seems significant that the true line of the river of 1905 is shown on the Texas map where such river line is to the west of the river of 1850, but it is not shown on the map correctly where such river line of 1905 is to the east of the river of 1850.

As further indicating that the State of Texas evidently considered that the position of the river of 1905 might be controlling in the vicinity of the Crawford lands, we find that survey 262 was patented by Texas so as to extend up to the river of 1905, as such river flowed to the west of the position which Texas claims for the river of 1850. In other words, Texas, believing that the boundary would follow the river when it changed its position by accretion, patented survey 262 up to the river of 1905, and, having the same belief,

Texas declined or neglected to have the engineer show the true position of the river in 1905 between the south line of the Canutillo Grant and Piedras Paradas, because said true line would have been to the east of the position claimed by Texas for the river of 1850.

The brief filed for the State of New Mexico has not dealt with any questions of accretion, nor with any of the matters referred to in this motion.

All of the land in the State of New Mexico affected by the matters herein referred to, and being the land lying between the south line of the Canutillo Grant and Piedras Paradas, is owned by your petitioner, L. M. Crawford, and his holdings affected by these matters consist of approximately one thousand acres of valuable valley land.

Your petitioner, therefore, respectfully prays that he be allowed, through his attorney, Thornton Hardie, of El Paso, Texas, to file a brief as *amicus curiæ* dealing with the matters referred to herein, and that he be allowed to also file by the same means a written argument upon the motion of the State of New Mexico to be allowed to introduce additional testimony concerning the matters referred to in the affidavit of R. J. Owen. And in the alternative your petitioner says that if it would seem better to this honorable court that the brief and argument be filed by Thornton Hardie as *amicus curiæ* instead of by your petitioner, then your petitioner and Thornton Hardie pray that said attorney be allowed to file such brief and argument as *amicus curiæ*.

Respectfully submitted,

L. M. CRAWFORD,
Petitioner.

THORNTON HARDIE,
His Attorney.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

Notice of Hearing on Motion.

To Honorable W. A. Keeling, Austin, Texas, Attorney General of the State of Texas, and W. W. Turney, El Paso, Texas, special counsel, solicitors for defendant, the State of Texas, and to Honorable Frank W. Clancy, Santa Fe, New Mexico, solicitor for complainant, the State of New Mexico:

Please take notice that on Monday, February 11, 1924, at the opening of court on that day, or as soon thereafter as counsel can be heard, a motion will be presented by L. M. Crawford and his attorney, Thornton Hardie, requesting permission to file an argument and brief in the above case as *amicus curiæ;* a copy of which said motion is herewith served on you will be submitted to the honorable judges of the Supreme Court of the United States, in the court-room, at

the Capitol, in the city of Washington, District of Columbia, for its decision thereon.

Dated at El Paso, Texas, this the 11th day of January, A. D. 1924.

L. M. CRAWFORD,
By THORNTON HARDIE,
His Attorney.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF TEXAS.

Affidavit of Service of Motion.

STATE OF TEXAS,
County of El Paso:

THORNTON HARDIE, being first duly sworn, on oath says that he served a copy of the foregoing and attached notice of hearing, together with a copy of the motion referred to in said notice, upon W. W. Turney, one of the attorneys for the State of Texas in the above cause, on the 11th day of January, A. D. 1924, by serving him in person, and also served a copy of said motion and a copy of said notice upon Frank W. Clancy, of counsel for the State of New Mexico, together with a copy of said motion, by depositing a copy of said motion, together with a copy of said notice, in the United States post office at El Paso, Texas, in a letter addressed to the said Frank W. Clancy, at Sante Fe, New Mexico, and said notice and motion were sent by registered mail, and same was mailed on the 11th day of January, A. D. 1924, and should in due course of mail be delivered to the said

Frank W. Clancy not later than the 12th day of January, A. D. 1924; and service was also made upon Hon. W. A. Keeling, Attorney General of the State of Texas, at Austin, Texas, by depositing a copy of said motion and a copy of said notice in a letter addressed to the said W. A. Keeling at Austin, Texas, and mailing said letter in the post office at El Paso, Texas, and sending same by registered mail, and said notice should in due course of mail reach Austin, Texas, and be delivered to the said W. A. Keeling not later than the 14th day of January, A. D. 1924.

THORNTON HARDIE.

Sworn to and subscribed before me, this the 15th day of January, A. D. 1924.

[SEAL.] M. A. VOGEL,
Notary Public in and for El Paso County, Texas.

My commission expires May 31, 1925.

[Endorsed:] 3. Orig'l, '23. Office of the Clerk, Supreme Court U. S. Received Jan. 19, 1924.

[Endorsed:] Supreme Court U. S., October Term, 1923. Term No. 3, Original. The State of New Mexico, complainant, *vs.* The State of Texas. Motion for leave to file brief of L. M. Crawford as *amicus curiæ*. Filed Jan. 19, 1924.

In the Supreme Court of the United States

OCTOBER TERM, 1923

ORIGINAL NO. 3.

STATE OF NEW MEXICO, COMPLAINANT,

vs.

STATE OF TEXAS, DEFENDANT.

RESPONSE OF THE STATE OF TEXAS TO MOTION OF L. M. CRAWFORD FOR LEAVE TO FILE BRIEF AND ADDITIONAL EVIDENCE HEREIN.

Now comes the defendant, the State of Texas, and in response to the motion filed herein by L. M. Crawford and his attorney for leave to file a brief as *amicus curiae* says:

I.

The defendant, the State of Texas, objects to the granting of leave to file said motion for the following reasons:

(a) While the motion states that L. M. Crawford and his attorney desire to file the brief as *amicus curiae* yet an examination of the motion discloses that said L. M. Crawford is a claimant of certain lands involved in the litigation.

(b) That while the motion is for the purpose of filing a brief, yet it is desired by the said L. M. Crawford as intervenor to submit to the court additional evidence in the case for and in his behalf based upon an affidavit attached to a motion just filed in this court in behalf of attorneys for the State of New Mexico, complainant herein, wherein the complainant asks leave of the court to be allowed to take said designated affidavit as additional evidence in behalf of said complainant.

(c) Because the motion is in substance and effect an intervention by L. M. Crawford in the above cause and is therefore a suit by an individual against the State of Texas which is specifically prohibited by the Eleventh Amendment to the Federal Constitution.

(d) Because to permit such intervention would thereafter give ground for innumerable claimants to become parties to the suit, each with the right to introduce testimony and to be heard in argument on the merits of the controversy between the State of New Mexico and the State of Texas with the result of delaying the litigation further and hindering the State of Texas in its proper defense heretofore made.

(e) Because if such motion to file brief as *amicus curiae*, in effect a motion to intervene, is granted, it will result in said intervenor and the State of New Mexico, complainant, introducing and offering as evidence testimony of a witness whom the State of Texas is denied the right to cross examine.

Wherefore, the defendant objects to the filing of said motion and to any and all applications for intervention herein for the reasons above specified.

STATE OF TEXAS:

W. A. KEELING,
Attorney General of Texas.

JNO. C. WALL,
WALACE HAWKINS,
Assistant Attorneys General.

W. W. TURNEY,
Special Counsel.

Solicitors for Defendant, State of Texas.